Ottavio Quattrocchi v Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–10 OF 2001
ABDUL AZIZ JCA
21 OCTOBER 2002

Criminal Procedure *— Extradition — Ad hoc extradition — Special direction given by Minister of Home Affairs under s 3 of the Extradition Act 1992 for provisions of the Act to apply to the Union of India in relation to extradition of applicant — Application for certiorari to quash special direction before extradition case presented to sessions court — Whether application for certiorari was premature*

The Union of India ('the fourth respondent') made a requisition to the Minister of Home Affairs ('the first respondent') for the return of the applicant as a fugitive criminal. As no order had been made under s 2 of the Extradition Act 1992 ('the Act') directing that the provisions of the Act shall apply to the Union of India, the first respondent gave a special direction in writing under s 3 of the Act that the provisions of the Act shall apply to the Union of India in relation to the extradition thereto of the applicant ('the special direction'). In addition, the first respondent issued an order authorizing the magistrate ('the second respondent') to issue a warrant for the apprehension of the applicant ('the said order'). The second respondent accordingly issued the warrant and the applicant was subsequently arrested and brought before the second respondent who, as required by s 12(3) of the Act, ordered that the case be transferred to the sessions court. Upon leave being granted by KC Vohrah J (as he then was), the applicant proceeded to make the present application for judicial review, in which the principal reliefs sought were orders of certiorari to quash the special direction, the said order and the warrant of apprehension. The grounds advanced by the applicant's counsel in support of the instant application were, inter alia, the applicant was not a 'fugitive criminal' pursuant to s 5 of the Act as he was not a person accused of an extradition offence and the first respondent had no jurisdiction to make the special direction and the said order if the applicant was not a fugitive criminal. The applicant's counsel had further stated that the reasons as to why it was necessary for the applicant to seek judicial review were that: (a) success for the applicant in judicial review would bring what he would not be able to obtain from success in the committal proceedings, namely, the quashing of the said order, which in turn would prevent the first respondent from using the said order against the applicant again; and (b) one of the ancillary orders sought was an order of prohibition to prevent any further action being taken by the first respondent, the second respondent and the sessions court judge pursuant to the existing request by the Union of India and any future requests premised on the same facts. The fourth respondent's counsel's

submission was that the applicant's application was premature because all the issues that had been raised for the applicant here could be raised in the committal proceedings in the sessions court, including the question of whether the applicant was a 'fugitive criminal' and for this application for judicial review to be entertained at all, the applicant must satisfy the court that he would not be able to raise in the sessions court any of the matters that had been raised on his behalf in these proceedings.

Held, dismissing the applicant's application:

(1) Based on the Privy Council's decision in *Government of the United States of America v Frederick Nigel Bowe* [1990] 1 AC 500, an application for a prerogative remedy was premature if it was made before the entire case for extradition had been presented to the extradition court. However, an application for a prerogative remedy made before the entire extradition case was presented to the extradition court was nevertheless appropriate when it was clear that the extradition proceedings must fail, for example, where the order to proceed was issued by the wrong person (see p 31D–E).

(2) The applicant's counsel did not respond to the assertion by the fourth respondent's counsel that the issues raised in these proceedings could be raised in the committal proceedings. Further, the applicant's counsel did not argue that s 19(1)(g) of the Act was not capable of enabling the 'person accused' issue to be raised in the sessions court. Therefore, this court was constrained to assume that the assertion made by counsel for the fourth respondent was correct (see p 37E–F).

(3) Based on the aforesaid and since s 19 of the Act had provided adequate avenues for challenges to the extradition process, the instant pre-committal application for judicial review of the extradition process was premature and ought not to be entertained unless there was good reason for seeking judicial review or it was clear that the committal proceedings must fail for reasons such as that the act challenged was done by the wrong person or that the offence specified was not an extradition crime. Here, no good reason had been shown by the applicant and there was no clear case that the committal proceedings must fail in the sense intended by the Privy Council in the case of *Government of the United States of America v Frederick Nigel Bowe* [1990] 1 AC 500, see pp 38H–39A).

(4) Following *R v Secretary of State for the Home Department, ex p Norgren* [2000] 3 WLR 181, the first respondent was not required to form a correct legal judgment before issuing the said order. Hence, the proposition by the applicant's counsel that the first respondent had no jurisdiction to make the special direction and the said order if the applicant was not a 'fugitive criminal' was too

broad because it would be placing on the first respondent a duty of forming a correct legal judgment on the question (see p 37A–C); *R v Secretary of State for the Home Department, ex p Norgren* [2000] 3 WLR 181 followed.

(5) The reasons stated by the applicant's counsel as to why it was necessary for the applicant to seek judicial review would not save this application from the objection of prematurity. Otherwise, to defeat such an objection of prematurity, the applicant need only to put in a prayer for an order of prohibition or advance the argument that judicial review had the advantage of quashing the order initiating the extradition process (see p 38D–E).

[Bahasa Malaysia summary

Kesatuan India ('responden keempat') telah membuat satu rekuisisi terhadap Menteri Dalam Negeri ('responden pertama') bagi penyerahan balik pemohon sebagai penjenayah buruan. Oleh kerana tiada perintah telah dibuat di bawah s 2 Akta Serahbalik 1992 ('Akta tersebut') mengarahkan bahawa peruntukan-peruntukan Akta tersebut perlu dipakai terhadap Kesatuan India, responden pertama memberikan suatu arahan bertulis khas di bawah s 3 Akta tersebut bahawa peruntukan-peruntukan Akta tersebut harus dipakai terhadap Kesatuan India berkenaan penyerahan balik pemohon tersebut ('arahan khas tersebut'). Tambahan pula, responden pertama telah mengeluarkan satu perintah memberi kuasa kepada majistret ('responden kedua') untuk mengeluarkan suatu waran menahan pemohon tersebut ('perintah tersebut'). Responden kedua mengeluarkan waran tersebut dan pemohon yang kemudiannya ditangkap dan dibawa ke hadapan responden kedua, yang seperti yang diwajibkan oleh s 12(3) Akta tersebut, memerintahkan agar kes tersebut dipindahkan ke mahkamah sesyen. Sebaik sahaja kebenaran diberikan oleh KC Vohrah H (beliau pada ketika itu), pemohon tersebut mula membuat permohonan ini untuk kajian semula kehakiman yang mana relif-relif utama yang diminta adalah perintah certiorari untuk membatalkan arahan khas tersebut, perintah tersebut dan waran penahanan. Alasan-alasan yang diberikan oleh peguam pemohon untuk menyokong permohonan tersebut adalah, antara yang lain, bahawa pemohon bukanlah seorang 'fugitive criminal' di bawah s 5 Akta tersebut kerana beliau bukanlah seorang yang dituduh melakukan suatu kesalahan serahbalik dan responden pertama tidak mempunyai bidangkuasa untuk membuat arahan khas dan perintah tersebut sekiranya pemohon bukan seorang penjenayah buruan. Peguam pemohon juga menyatakan sebab-sebab mengapa ia menjadi suatu keperluan bagi pemohon mendapatkan kajian semula kehakiman, iaitu: (a) kejayaan bagi pemohon dalam kajian semula kehakiman akan memberikan beliau apa yang tidak dapat diperolehi oleh beliau daripada kejayaan dalam prosiding komital, iaitu, pembatalan perintah tersebut, yang dapat menghalang responden

pertama dari menggunakan perintah tersebut terhadap pemohon sekali lagi; dan (b) salah satu daripada perintah sampingan yang diminta merupakan suatu perintah melarang sebarang tindakan selanjutnya diambil oleh responden pertama, responden kedua dan hakim mahkamah sesyen menurut permintaan Kesatuan India dan apa jua permintaan kelak atas fakta-fakta yang sama. Hujahan peguam responden keempat adalah permohonan pemohon adalah pramasa kerana semua isu-isu yang dibangkitkan bagi pihak pemohon dalam permohonan ini boleh dibangkitkan dalam prosiding komital di dalam mahkamah sesyen, termasuk persoalan sama ada pemohon adalah seorang 'fugitive criminal', dan supaya permohonan bagi kajian semula kehakiman ini boleh dilayan, pemohon mestilah meyakinkan mahkamah bahawa beliau tidak dapat mengemukakan mana-mana isu yang telah dibangkitkan bagi pihak beliau dalam prosiding-prosiding ini di mahkamah sesyen.

Diputuskan, menolak permohonan pemohon:

(1) Berdasarkan keputusan Majlis Privy dalam *Government of the United States of America v Frederick Nigel Bowe* [1990] 1 AC 500, suatu permohonan untuk remedi prerogatif adalah pramasa jika dibuat sebelum keseluruhan kes serahbalik dikemukakan di hadapan mahkamah serahbalik. Walau bagaimanapun, suatu permohonan untuk remedi prerogatif yang dibuat sebelum kes serahbalik tersebut dikemukakan di hadapan mahkamah serahbalik wajar dan sesuai sekiranya ianya jelas bahawa prosiding serahbalik tersebut akan gagal, misalnya di mana perintah untuk meneruskan prosiding tersebut telah dikeluarkan oleh pihak yang salah (lihat ms 31D–E).

(2) Peguam pemohon tidak membalas pernyataan peguam responden keempat bahawa isu-isu yang telah dibangkitkan dalam prosiding-prosiding ini boleh dibangkitkan dalam prosiding-prosiding komital tersebut. Selain itu, peguam pemohon tidak membantah bahawa s 19(1)(g) Akta tersebut tidak berupaya membolehkan isu 'orang yang tertuduh' dibangkitkan di mahkamah sesyen. Oleh itu, mahkamah ini berpendapat bahawa pernyataan peguam responden keempat adalah betul (lihat ms 37E–F).

(3) Berdasarkan maklumat yang diberikan dan oleh kerana s 19 Akta tersebut telah memberikan peluang mencukupi untuk mencabar proses serahbalik tersebut, permohonan pra-komital untuk kajian semula kehakiman bagi proses serahbalik kini adalah pramasa dan tidak patut dilayan melainkan terdapat sebab yang baik untuk mendapatkan kajian semula kehakiman ataupun ia jelas bahawa prosiding komital tersebut akan gagal bagi sebab-sebab seperti tindakan yang dicabar dilakukan oleh pihak yang salah ataupun kesalahan yang dinyatakan bukannya satu jenayah serahbalik. Dalam kes ini, tiada sebab yang baik telah ditunjukkan oleh

pemohon dan tidak terdapat kes yang jelas bahawa prosiding komital akan gagal seperti yang diniatkan oleh Majlis Privy dalam kes *Government of the United States of America v Frederick Nigel Bowe* [1990] 1 AC 500 (lihat ms 38H–39A). A

(4) Menurut *R v Secretary of State for the Home Department, ex parte Norgren* [2000] 3 WLR 181, responden pertama tidak perlu membentuk satu penghakiman yang betul sebelum mengeluarkan perintah tersebut. Oleh itu, hujahan peguam pemohon bahawa responden pertama tidak mempunyai bidangkuasa untuk membuat arahan khas dan perintah tersebut jika pemohon bukannya seorang 'fugitive criminal' adalah terlalu luas kerana ia memberikan responden pertama beban membentuk satu penghakiman undang-undang yang betul atas persoalan tersebut (lihat ms 37A–C); *R v Secretary of State for the Home Department, ex p Norgren* [2000] 3 WLR 181 diikut. B C

(5) Sebab-sebab yang diberikan oleh peguam pemohon kenapa ia wajib bagi pemohon mendapatkan kajian semula kehakiman tidak akan menyelamatkan permohonan ini daripada bantahan pramasa. Jika tidak, untuk menewaskan satu bantahan pramasa seperti ini, pemohon hanya perlu mengemukakan permohonan bagi perintah larangan atau mengemukakan hujahan bahawa kajian semula kehakiman mempunyai kelebihan membatalkan perintah untuk memulakan proses serahbalik (lihat ms 38D–E). D E

Notes

For cases on ad hoc extradition, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1573–1575. F

Cases referred to

Government of the United States of America v Frederick Nigel Bowe [1990] 1 AC 500 (refd) G

R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (Amnesty International and others intervening) (No 3) [1999] 2 All ER 97 (refd)

R v Secretary of State for the Home Department, ex p Norgren [2000] 3 WLR 181 (folld) H

R v Secretary of State for the Home Department ex parte Ugarte Queen's Bench Division (Crown Office List), CO/1786/99 (refd)

Reg v Secretary of State for the Home Department, ex p Gilmore [1999] QB 611 (refd)

Regina v Governor of Brixton Prison, ex p Kahan [1989] 1 QB 716 (refd) I

Regina v Magistrates Campbell and Pool, ex p MacLeod 58 DLR (2d) 94 (refd)

Legislation referred to

Criminal Procedure Code [India]
Extradition Act 1992 ss 2, (1), 3, 5, 12(3), 15, 19, (1), (g), 36, 37
Extradition Act 1870 [Eng] s 7
Extradition Act 1989 [UK]
Penal Code 1860 [India] ss 120B, 420
Prevention of Corruption Act 1947 [India] s 5, (1)(d), (2)
Specific Relief Act 1950 s 54(d)

Cecil Abraham (*Dato' Muhammad Shafee Abdullah, Azhar Azizan Harun, Shanti Mogan, Raymond Low, Rabinder Singh* and *Jimmy Liew* with him) (*Shafee & Co*) for the applicant.

Abdul Karim Abdul Jalil (*Kamarul Hisham, Azman Ahmad, Nik Ahmad Marjuki, Azmir Shah, Farahanah bte Rabidin* and *Sharlyza Alis* with him) (Attorney-General's Chambers) for the first, second and third respondents.

Dato' Dr Cyrus V Das (*Steven Thiruneelakandan* and *Sudharsanan Thillainathan* with him) (*Shook Lin & Bok*) for the fourth respondent.

Abdul Aziz JCA: The Union of India made a requisition to the Minister of Home Affairs, the first respondent, for the return of the applicant as a fugitive criminal who was said to be accused of the commission of the following offences falling within the jurisdiction of the Union of India: criminal conspiracy (s 120B), read with s 420 (cheating and dishonestly inducing delivery of property) of the Indian Penal Code 1860 and s 5(2) read with s 5(1)(d) (criminal misconduct) of the Prevention of Corruption Act 1947.

As no order had been made under s 2 of the Extradition Act 1992 ('the Act') directing that the provisions of the Act shall apply to the Union of India, the minister, on 15 December 2000, gave a special direction in writing under s 3 of the Act that the provisions of the Act shall apply to the Union of India in relation to the extradition thereto of the applicant. Section 3 provides as follows:

> Where a country in respect of which no order has been made under s 2 makes a request for the extradition thereto of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act shall apply to that country in relation to the extradition thereto of that particular fugitive criminal.

On the same day, pursuant to s 12(3) of the Act, the minister issued an order signifying to the magistrate, the second respondent, that the requisition had been made, and authorizing him to issue a warrant for the apprehension of the applicant. The order cited the offences specified in the Union of India's requisition. The magistrate issued the warrant on 18 December. The applicant was arrested on 20 December and was, as required by s 15, brought before a magistrate who, as required by that section, ordered that the case be transferred to the sessions court, which was done on the same date. The sessions court, whose judge is the third

defendant, is the court having jurisdiction to conduct committal proceedings under s 19. On that date, the applicant's counsel raised objections as to the propriety of the whole proceedings and of the charges, and the hearing was postponed to another date. I am told by the Union of India's counsel, Dato' Dr Cyrus Das, that there were lengthy arguments on 10 February 2001 on issues that have been raised before me by the applicant's counsel, Mr Cecil Abraham and Dato' Muhammad Shafee Abdullah.

Upon leave being granted on 8 March 2001 by KC Vohrah J (as he then was), the applicant proceeded to make the application for judicial review that is now before me, in which the principal reliefs sought are orders of certiorari to quash the special direction and the order of the minister of 15 December 2000, and the magistrate's warrant of apprehension. With the leave, the applicant also obtained from KC Vohrah J a stay of the committal proceedings in the sessions court, which were then due to be continued on 3 April 2001, when the sessions court, I am told by Dato' Das, was due to decide on the objections that had been raised by the applicant's counsel.

I commenced hearing the judicial review application on 26 November 2001 after the Union of India had been made a party as the fourth respondent. The submission for the applicant was heard first to completion. Several grounds were advanced for quashing the order of the minister and the warrant of the magistrate, the principal ground being that the applicant was not a 'fugitive criminal' because, according to the definition of that term in s 5 of the Act, for the applicant to be a fugitive criminal he must be a 'person who is accused of ... an extradition offence' committed within the jurisdiction of the Union of India, whereas the applicant, it was argued, was not such a person because, it was submitted, he had not been 'accused' of the offences for which his extradition was sought since, it was argued, he had not been charged by the Union of India with those offences and moreover no formal charges had been drawn up against him specifying the necessary particulars of the offences alleged against him. In support of the principal ground, references were made to the various steps that had been taken in India, mostly under the Indian Criminal Procedure Code, in respect of the applicant leading to the requisition for his extradition, the various related provisions of the Criminal Procedure Code, affidavit evidence as to the significance of those steps for the question whether or not the applicant was a person accused of the offences for which his extradition was sought, and various authorities.

Several grounds were also advanced for quashing the special direction of the minister, including the ground, for the same reasons, that the applicant was not a 'fugitive criminal', but the foremost ground was that there exists no binding arrangement or treaty between Malaysia and the Union of India for the extradition of fugitive criminals. I have mentioned that no order has been made under s 2 directing that the Act shall apply to the Union of India. For an order to be made under s 2, sub-s (1) requires that 'a binding arrangement has been entered into between Malaysia and

A [the Union of India] for the extradition of fugitive criminals'. Because there was no such binding arrangement and therefore no order had been made under s 2, the minister resorted to making an order under s 3, which I have quoted, for the making of which it can be seen that the section does not say that there must be in existence a binding extradition arrangement between Malaysia and the country concerned. The argument advanced for the B applicant, which was sought to be supported by references, inter alia, to previous statutes and to several authorities, was that s 3 must be read as requiring the existence of a binding arrangement or treaty since it does not expressly say that it applies where no binding arrangement has been made. Although counsel for the respondents have not yet replied to that argument C and although the time has not come for me to decide the point, I am unable to resist remarking that the construction suggested for s 3 strikes me as unconventional.

One of the grounds for judicial review relied on when the applicant originally made his application, namely that the offences alleged against him were political offences, was not pursued during his counsel's D submission.

After counsel for the applicant finished their submission, Dato' Das for the Union of India commenced his submission in reply by setting out at length the background of events, commencing in 1980, which comprised the transactions and happenings that built up into what the Indian E authorities regarded as constituting, at least in part, or pointing to the offences alleged against the applicant, and certain disclosures that were made that to the Indian authorities implicated him in those offences.

After setting out the background, Dato' Das began submission on the law, his first point being that the act of the magistrate, the second F respondent, in issuing the warrant of apprehension is not subject to judicial review.

Dato' Das next raised the point — the question of prematurity — that I have now to decide. The gist of his argument is that a pre-committal challenge of extradition measures by way of judicial review is contrary to the G policy of the Act because in the committal proceedings in the sessions court under s 19 of the Act, the subject of the proceedings will be able to raise virtually every issue that can be raised to resist extradition, and if he is committed, he will be able to apply for a writ of habeas corpus to the High Court under s 36. Dato' Das submitted that in the present case all the issues that had been raised for the applicant could be raised in the committal H proceedings in the sessions court, including the question whether the applicant is a 'person who is accused' for purposes of the definition of 'fugitive criminal', which, he said, could be raised by virtue of para (g) of s 19(1), which specifies one of the matters as to which the sessions court is required to receive any evidence that the applicant might tender to show, namely 'that his return would not be in accordance with the provisions of I this Act'. Dato' Das argued that for this application for judicial review to be entertained at all, the applicant must satisfy the court that he would not be able to raise in the sessions court any of the matters that had been raised on

his behalf in these proceedings. Encik Kamarul Hisham, one of the Federal Counsel representing the first three respondents, in giving his support to the argument of Dato' Das, added the argument that since the applicant has available to him a specific remedy in the committal proceedings, he must exhaust that remedy before seeking judicial review. A

Several authorities were cited by counsel for the respondents in support of the argument of prematurity. I shall revert to them, and consider several of them, in due course. B

Dato' Das urged the court to decide at this stage the prematurity issue alone so as, if it be decided in his favor, to terminate what would otherwise be lengthy proceedings and avoid 'a long forensic journey' for the extradition of the applicant. To him, if the court is satisfied that all the points that have been raised in these proceedings for the applicant could be raised in the committal proceedings, the prematurity objection ought to succeed. (Incidentally, if I am right as to the intended reference, the expression is 'extended forensic journey' and was used in the judgment of Ognall J dated 27 May 1999 on an application by Senator Pinochet, about which I shall say a bit more later). C D

That the proceedings would be a lengthy one if they are not terminated at this stage is true in view of the fact that after several days of hearing there are still matters raised by the applicant's counsel that the Union of India's counsel has to submit on, some one of the Federal Counsel has yet to make his submission in reply, and of course the applicant's counsel will want to reply finally to the submissions of the respondents' counsel. E

That the process to extradite the applicant will go on a long forensic journey if the application for judicial review is entertained is, as submitted by Dato' Das, obvious from the fact that the political offence issue is not going to be pursued in these proceedings, being reserved for the sessions court. If the present application is entertained as to all the issues raised, any decision on it may be appealed to the Court of Appeal, with a further appeal to the Federal Court. If finally the applicant fails on judicial review, the committal proceedings will proceed on the political offence issue and probably on other issues. If the applicant is committed to prison, he may apply to the High Court for a writ of habeas corpus under s 36. If the applicant is discharged, there may be an application by the Public Prosecutor to the High Court for judicial review of the order of discharge on any question of law. From the High Court, any decision on an application under ss 36 or 37 may be appealed to the Court of Appeal and further to the Federal Court. Dato' Das submitted that there is no reason why all the issues that the applicant wished to raise could not be taken up neatly at one go in the committal proceedings in the sessions court as so to bring about a considerable saving of judicial time all round. F G H

After hearing arguments as to whether the prematurity question should be decided first, I decided that it should. I then proceeded to hear the submission in reply of the applicant's counsel on the question, and the closing submissions of the respondents' counsel. I

I should like to place on record in this judgment that Dato' Das has submitted on the person accused question, although I am not sure whether what he has submitted so far is his entire submission on the question or whether he has anything further to submit on it, and that the reason he proceeded to submit on that question after asking the court to rule on the prematurity question was because on that day, 23 May 2002, Dato' Shafee was not available to reply on the question whether the prematurity question alone should be debated first and decided at that stage. Since there was still time available that day, so that it would not have been wasted should the prematurity issue ultimately fail, I directed Dato' Das to continue his submission on other points.

Dato' Shafee for the applicant has not argued that any of the issues that have been raised in these proceedings for the applicant could not be raised in the committal proceedings in the sessions court. Neither has he argued that the prematurity question would not be capable of being raised in the sessions court by virtue of para (g) of s 19(1). I am therefore constrained to assume that Dato' Das was right in saying that all the issues that have been raised for the applicant here could be raised in the sessions court and that para (g) of s 19(1) would enable the applicant to raise the person accused issue in the sessions court.

Although a number of authorities were cited by Dato' Das — two were added by En Kamarul Hisham — in support of the prematurity argument, I find only three authorities that can reliably be used as a guide for deciding the prematurity question. The other authorities, although they may provide ground for saying generally and perhaps by analogy that the courts frown upon any move to seek pre-committal judicial review of extradition measures, have features peculiar to them that may have resulted in their being decided in the way they were. My choice of the three authorities coincides with Dato' Das' statement in his final submission in reply that they are the governing cases on the question of prematurity, with the addition, however, of another case, that is *Regina v Governor of Brixton Prison, ex p Kahan* [1989] 1 QB 716. But, for the same kind of reason that I have stated earlier generally for laying aside the other cases cited by Dato' Das, I would not use *ex p Kahan* to decide the prematurity point in the circumstances of the present case. *Ex p Kahan* was a pre-committal application for habeas corpus which was refused because it would clearly involve the Divisional Court in becoming the role of fact finder, where the evidence was far from complete, on a contention that the offence concerned was of a political character, a task which the procedures of the Divisional Court were not adapted to. I do not think that any fact finding that may be necessary for the person accused question in this case will be the same kind of fact finding that may be necessary to determine whether an offence is of a political character, a kind that the procedures of the court are not adapted to.

So I now turn to consider the three authorities.

The first is a statement by the Privy Council in *Government of the United States of America v Frederick Nigel Bowe* [1990] 1 AC 500, which was an

appeal from the Court of Appeal of the Bahamas in the matter of the fugitive Bowe, whose extradition from the Bahamas was sought by the US Government to face charges for drug related offences. The US Government wanted to try him for, inter alia, conspiracy to import cocaine. A

The effort to extradite the fugitive had necessitated the issuance, at different times, of several orders by the Bahamian authorities and of several magistrate's warrants which resulted in several court proceedings at different levels. The effort culminated in several appeals to the Privy Council by both the US Government and the fugitive, which were about costs and the question of extradition. The statement relied on by Dato' Das, which I shall quote subsequently, was made in relation to the question of extradition and had reference to only an episode, a later one, in the history of the effort to extradite Bowe. But before I bring that episode into focus, I should like to mention an earlier episode because it also involved the question of prematurity although the said statement of the Privy Council was not, to my understanding, made in reference to that earlier episode. B C D

An order under s 7 of the Extradition Act 1870 of England requiring the magistrate to issue a warrant for the apprehension of the fugitive had been issued by the Bahamian Minister of Foreign Affairs instead of, as it should have been, by the Governor-General. The warrant was duly issued and the fugitive was arrested and subjected to extradition proceedings before the magistrate, who ruled that the fugitive had a case to answer. On an application for leave to apply for orders of certiorari and prohibition, the Supreme Court (the superior court of first instance) ruled that the application was premature since the proceedings before the magistrate were incomplete. The fugitive succeeded in his appeal to the Court of Appeal against that ruling and his application was remitted to the Supreme Court for hearing. The Supreme Court quashed the magistrate's court proceedings on the ground that the order to the magistrate must be signed by the Governor-General. See pp 514–515. So, at that stage in the extradition history, there were no more court proceedings relating to the extradition of the fugitive. I mention that episode to show that the Bahamian Court of Appeal did not agree with the Supreme Court that because the extradition proceedings were incomplete the Supreme Court ought not to entertain the fugitive's application for orders of certiorari and prohibition. E F G

The episode to which the said statement of the Privy Council referred occurred after that episode. Another order, a third order, to the magistrate was issued, this time, correctly, by the Governor-General (see p 515). The magistrate issued another warrant and the fugitive was again arrested, and presumably extradition proceedings commenced before the magistrate's court. The fugitive sought and obtained leave from the Supreme Court to apply for orders of certiorari and prohibition to quash the warrant and the proceedings before the magistrate's court (see p 515). The application was heard by the Supreme Court and was refused (see p 516). The fugitive appealed to the Bahamian Court of Appeal, who allowed the appeal and H I

granted an order of certiorari to bring up and quash the warrant and the proceedings pursuant thereto (see p 516). The US Government appealed to the Privy Council. The main question in the appeal was whether conspiracy to import cocaine was an offence in respect of which a warrant could be issued (see p 516). The appeal was allowed, meaning that the extradition proceedings should be completed.

The statement of the Privy Council came immediately after their Lordships had disposed of the issues concerning the extradition aspect of the appeals in favor of the US Government. It appears at p 526 as follows:

> The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied.

The statement is about prematurity. It means that to the Privy Council an application for a prerogative remedy would be premature if it is made before the entire case for extradition has been presented to the extradition court. An application for a prerogative remedy made before the entire extradition case is presented to the extradition court is nevertheless appropriate when it is clear that the extradition proceedings must fail. An example of that is given, that is where the order to proceed is issued by the wrong person, but there can be other examples. The basis for the statement, as I understand it to be from the way in which the statement is put, is purely one of practicality having to do with economy of judicial time. If judicial review is sought in a case where it is clear that the extradition proceedings must fail, judicial review will be granted and that will be the end of the extradition proceedings. Otherwise, judicial review may not be granted, and the extradition proceedings will have to go on. Better, therefore, to let the extradition proceedings go on to completion uninterrupted by judicial review, so that there will in all only be one application for judicial review, the one after the end of the extradition proceedings.

Dato' Shafee's response to that statement in *Bowe* was to urge the court to examine the passage cited in the context of the entire case. He said that the decision that attracted the comment of the Privy Council was on the third 'application' and he referred to pp 514–515 of the report, saying that it was in that context that the Privy Council expressed displeasure at the manner in which the proceedings were delayed. I do not know what Dato' Shafee meant by the third 'application', but pp 514–515 that he referred to are about what I have referred to as a previous episode. The appeal before the Privy Council concerned events in the episode after that, that began with the making of a third order to the magistrate and that are described from p 515 onwards. At p 515, the Privy Council said that it was the events

from p 515 onwards that formed the background to the extradition appeal. So it is not true that the Privy Council's statement was directed to the events at pp 514–515. But what is more important is that it matters not to which events or episode the statement referred. It can stand on its own for general application. There has, therefore, been no valid answer by Dato' Shafee to that statement.

In *Reg v Secretary of State for the Home Department, ex p Gilmore* [1999] QB 611, the fugitive applicants sought judicial review by way of certiorari to bring up and quash the Home Secretary's orders to proceed for their extradition to the United States of America on the ground that the offences specified in the orders were not extradition crimes. The Divisional Court of the Queen's Bench Division found that the offences were not extradition crimes and quashed the orders to proceed. All that the court had to do to arrive at its decision was to look at the orders and consider the law, that is the relevant statutory provisions, the relevant provisions of the relevant treaty and the relevant authorities.

This was what Lord Bingham of Cornhill CJ, delivering the judgment of the Divisional Court in *R v Secretary of State for the Home Department, ex p Norgren* [2000] 3 WLR 181, said at pp 193–194 in reference to *ex p Gilmore*:

> If in his order to proceed the Home Secretary specifies an offence or offences which are not included within the relevant statutory provision or treaty, the order is on its face unlawful and we do not doubt that the subject of such an order may apply to the court forthwith to quash it. Such was the case in *Reg v Secretary of State for the Home Department, ex p Gilmore* [1999] QB 611: certiorari was granted and it does not appear to have been argued on behalf of the Home Secretary that such relief was inappropriate or premature. It would indeed seem wrong for anyone to be subjected to arrest and possible confinement, and to be obliged to contest proceedings, where the initiating document shows on its face a clear excess of jurisdiction.

The court in *ex p Norgren* viewed *ex p Gilmore* as an appropriate case for judicial review because 'the initiating document shows on its face a clear excess of jurisdiction'. As far as the material for the case was concerned, the court, as I said, had only to look at the orders and what was specified in them as extradition crimes.

In *ex p Norgren*, the applicant sought, besides other orders, an order of certiorari to quash a decision of the Home Secretary to issue an order to proceed for his extradition to the United States of America. Unlike in *ex p Gilmore*, where the ground for the applications was that the offences specified in the orders to proceed were not extradition crimes, the principal ground for the application in *ex p Norgren* was that the conduct alleged, that is what the applicant was alleged to have done, was not an extradition crime.

For the applicant it was argued, inter alia, that it was for the Home Secretary to decide whether the conduct of which a person whose extradition was sought was accused was an extradition crime, that it was not an issue that the magistrate was permitted to decide following the making

of an order to proceed, that the conduct of which the applicant was accused was not in law an extradition crime, and that therefore it was appropriate at that stage to apply to quash the order to proceed. For the Home Secretary it was, on the contrary, argued that while the Home Secretary must form the bona fide opinion that the conduct of which the person whose extradition was sought was accused constituted an extradition crime, the Home Secretary's role was not that of a legal arbiter, and provided he was satisfied that the conduct appeared to constitute an extradition crime, he was entitled to make the order to proceed, and it was for the magistrate to decide whether there was prima facie evidence that the person did what he was said to have done and, if so, whether, if done in England, it would constitute an extraditable crime. The danger of 'satellite litigation' was highlighted if issues of that kind were litigated, perhaps to the House of Lords, before any effective hearing in the magistrate's court had even begun (see pp 187–188).

The Divisional Court, after considering the relevant provisions of statute and subordinate legislation, agreed with the Home Secretary and refused the application without deciding whether the conduct alleged against the applicant amounted to an extradition crime even though, to quote Lord Bingham CJ (p 194), 'Having heard the competing contentions of the parties, and helpful submissions on behalf of the United States Government, we have inevitably formed tentative views on the likely outcome if the matter were to proceed before the magistrate'. Having studied the judgment, I think that the ratio of the decision is well summed up in para (3) of the headnote, although a passage in the judgment at p 194 does not appear to be reflected in the said para (3). According to that paragraph, from which I omit the first part of it that reflects the words of Lord Bingham CJ that I have quoted concerning *ex p Gilmore*, the court held:

> ... that, where the Secretary of State had specified offences under the Act of 1985 which fell within the definition of an 'extradition crime' in para 20 of Sch 1 to the Act of 1989, he was not required to form a correct legal judgment before issuing his order to proceed as to whether the conduct alleged, if it took place within the English jurisdiction, would constitute the crime specified in the order; that it would be for the magistrate, were the warrant to be executed and the proceedings heard, to consider the evidence tendered and, if satisfied of its sufficiency, to reach such a determination; that the statutory scheme envisaged that any challenge by way of judicial review should follow, not precede, the magistrate's ruling; and that, accordingly, the court should not determine that issue on the present application in advance of his ruling ...

Dato' Shafee's answer to *ex p Norgren* was that the opinion of the Divisional Court as expressed by Lord Bingham CJ was per incuriam because, according to Dato' Shafee, it was the same opinion that had been held by the Divisional Court in the *Pinochet* case ([1998] All ER (D) 509) where Lord Bingham CJ was the presiding judge, but, according to Dato' Shafee, that opinion had been overruled on appeal by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte*

(Amnesty International and others intervening) (No 3) [1999] 2 All ER 97 (*'Pinochet (No 3)'*). Dato' Shafee recommended that I read the speeches of Lord Browne-Wilkinson and Lord Hope of Craighead, and he pointed to several passages in those speeches to prove his point.

I have read those two speeches carefully in their entirety and I do not see that even if, which is not clear, the Divisional Court had made a ruling as to prematurity, the House of Lords had overruled such a ruling. It is highly unlikely that the Divisional Court in *ex p Norgren* would have applied a ruling that had been overruled by the House of Lords.

In *Pinochet (No 3)*, upon a request by the Spanish Government for the extradition of Senator Pinochet, a magistrate issued a provisional warrant for his arrest and he was arrested. A further provisional warrant was issued by another magistrate. Senator Pinochet applied for judicial review to quash the two warrants and the Divisional Court quashed both warrants. The appeal to the House of Lords, which was by the Commissioner of Police and the Spanish Government, was only as regards the quashing of the second warrant.

The application to quash the warrants had been made on two grounds, namely that Senator Pinochet was entitled to immunity in respect of acts committed when he was head of state in Chile and that the charges made against him specified conduct comprising acts which were not extradition crimes. The Divisional Court quashed the second warrant on the ground that Senator Pinochet was entitled to immunity in respect of the acts with which he was charged (p 102). The court held that the question whether the offences alleged were extradition crimes for which Senator Pinochet could lawfully be extradited, if he had no immunity, 'was not a matter to be considered in that court at that stage' (see p 132). It is not stated in that passage why the Divisional Court so held. I would assume, as the most likely reason, and I am aware that I am making a risky conjecture, that it was because, the question of immunity having been decided in Senator Pinochet's favor, it did not matter whether certain crimes alleged in the second warrant were or were not extradition crimes. I am very reluctant to assume that the reason was that of prematurity, that is that the question was one to be decided by the magistrate in the extradition proceedings, because the Divisional Court having ruled on immunity there was nothing left to go to the magistrate and Senator Pinochet would have been released from custody but for the order of the court that he was not to be released from custody pending an appeal to the House of Lords (p 99). I should, however, mention that according to Ognall J in his judgment dated 27 May 1999 that I have mentioned, Lord Bingham CJ did observe 'that, save in unusual circumstances, application for judicial review at early stages of an extradition process are to be discouraged'.

The question of the meaning of 'extradition crime' centered on the double criminality rule, that is the requirement that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom and concerned in particular the charges relating to torture and conspiracy to torture. The question arose because torture

committed anywhere in the world became a crime in the United Kingdom only on 29 September 1988, whereas the accusation against Senator Pinochet concerned acts that included those alleged to have been committed before that date, and the question was 'whether or not the definition of an "extradition crime" in the [Extradition Act 1989] requires the conduct to be criminal under UK law at the date of commission or only at the date of extradition' (p 101).

As I said, the Divisional Court did not decide that question.

The appeal to the House of Lords was decided twice, because the decision after the first hearing was set aside on the ground that the appellate committee hearing the appeal was not properly constituted. At the first hearing, the argument was directed almost entirely to the question of immunity, the question as to the meaning of 'extradition crime' or as to the double criminality rule being either regarded as no more than a side issue or being conceded in favor of the appellants, and it was only during the second hearing that the importance of the point became fully apparent (pp 101, 132).

The event from which the importance of the point emerged was this. Originally, the acts alleged against Senator Pinochet in the second provisional warrant began only after Senator Pinochet became head of state in Chile. But by the time the appeal was reheard by the second Appellate Committee of the House of Lords, Spain had put in further particulars of the charges which they wished to advance, as a result of which, in order to bring some order to the proceedings, counsel for the appellants, Mr Alun Jones QC, prepared a schedule of 32 UK criminal charges which corresponded to the allegations made against Senator Pinochet under Spanish law and those charges included things that were said to have happened before Senator Pinochet became head of state in Chile (p 103–104). For easy comprehension of how, from that event, the importance of the double criminality issue came to be seen and what was its importance, I shall quote from the speech of Lord Goff of Chieveley, who dissented on the question of immunity. Lord Goff, after saying that the issue had not previously been of importance, said at pp 117–118:

> At the hearing before your Lordships Mr Alun Jones, for the appellants, sought to extend backwards the period during which the crimes charged were alleged to have been committed, with the effect that some of those crimes could be said to have taken place before the coup following which Senator Pinochet came into power. The purpose was obviously to enable the appellants to assert that, in respect of these crimes, no immunity as former head of state was available to him. As a result Ms Clare Montgomery QC, for Senator Pinochet, revived the submission that certain of the charges related to crimes which were not extradition crimes because they were not, at the time they were alleged to have been committed, criminal under the law of this country, thus offending against the double criminality rule. Mr Alun Jones replied to this argument but, for the reasons given by my noble and learned friend Lord Browne-Wilkinson, with which I am respectfully in complete agreement, I too am satisfied that Ms Montgomery's submission was well founded.

> The appellants did not, however, analyze the consequences of this argument, if successful, in order to identify the charges against Senator Pinochet which would survive the application of the double criminality rule. That substantial task has, however, been undertaken by my noble and learned friend, Lord Hope of Craighead, to whom your Lordships owe a debt of gratitude. His analysis I respectfully accept. As he truly says, the impact upon the present case is profound. The great mass of the offences with which Senator Pinochet is charged must be excluded ...

It is clear from that passage that the argument about double criminality was revived as a necessary counter to the attempt by the appellants, for the purpose of the issue as to immunity, to extend backwards the period of commission of the crimes alleged. What counsel for Senator Pinochet sought to argue was that even if, by the extension of the period, Senator Pinochet did not enjoy immunity in respect of the relevant crimes, they were not extradition crimes because the rule of double criminality was not satisfied in respect of them and Senator Pinochet could not lawfully be extradited for them. It was in consequence necessary for the House of Lords to determine whether for the purpose of the double criminality rule the relevant conduct must be criminal under UK law at the date of commission as contended by Senator Pinochet and, if so, as the House of Lords in fact decided, to identify which of the charges would survive the application of the double criminality rule and would, if Senator Pinochet did not enjoy immunity in respect of them, provide a basis for his extradition.

In those circumstances, there was no way for the appellants to argue that the question of extradition crime or double criminality was a premature question. To raise the issue of prematurity was simply out of the question. It was not raised and there was no ruling by the House of Lords as to prematurity.

Therefore Dato' Shafee's answer to *ex p Norgren* is not valid.

I should mention that as a sequel to the House of Lord's decision in *Pinochet No 3*, which was that extradition proceedings could continue in respect of certain extradition crimes to which no immunity attached, Senator Pinochet made another bid for judicial review, but his application for permission to move for judicial review was refused by Ognall J on the ground of prematurity. The case was *R v Secretary of State for the Home Department ex parte Ugarte* Queen's Bench Division (Crown Office List), CO/1786/99, of which what has been made available to me is only a Lexis transcript copy of the judgment of Ognall J dated 27 May 1999. It is that judgment that I have mentioned at two places in this judgment and that uses the expression 'extended forensic journey'. I observe that *Bowe* was cited in argument in support of the argument that judicial review would be premature.

Aside from arguing against the authorities cited by the respondents' counsel, Dato' Shafee submitted that a question of law that goes to jurisdiction to initiate arbitration proceedings and that does not involve a determination or an examination of the facts, is amenable to judicial review. In the context of the person accused question in this case, I suppose

what Dato' Shafee meant is that the question goes to jurisdiction in the sense that the minister had no jurisdiction to make the special direction and the order of 15 December 2000 if the applicant was not a 'fugitive criminal' for not being 'a person who is accused', and that if it can be shown that the applicant is not a fugitive criminal for that reason, the minister's special direction and order must be quashed on judicial review. I think that such a proposition is too broad because it would be placing on the minister a duty of forming a correct legal judgment on the question, whereas, as has been seen in *ex p Norgren*, Lord Bingham CJ said that the Home Secretary was not required to form a correct legal judgment as to whether the conduct alleged against the applicant would constitute the crime specified in his order to proceed if it took place within the English jurisdiction. In view of that ruling, it would be difficult to successfully argue that the minister was required to form a correct legal judgment in this case as to whether the applicant was 'a person who is accused', even if it were solely a question of law. But in this case it is not solely a question of law. It is a question of law that is highly controversial and that requires at least an examination of the proceedings in India in respect of the applicant and of Indian law and practice in the area of criminal procedure, which are matters of fact involving consideration of affidavit evidence of opinions to arrive at a conclusion as to whether the applicant is 'a person who is accused'.

I have already said that there has been no response by Dato' Shafee to the assertion by Dato' Das that the issues that the applicant had raised in this application could be raised in the committal proceedings and that Dato' Shafee has not argued that para (g) of s 19(1) is not capable of enabling the person accused issue to be raised in the sessions court. Dato' Shafee has, however, argued that there are two reasons why it is necessary for the applicant to seek judicial review. The first reason is that success for the applicant in judicial review would bring what he would not be able to obtain from success in the committal proceedings, namely the quashing of the minister's order, which the minister will then not be able to use again against the applicant, but to my mind such an advantage would be illusory if the minister may issue another order, and that question was not argued. I may mention that the Privy Council in *Bowe* made the observation at p 527 that several orders under s 7 of the Extradition Act 1870 'can lawfully be made on foot of the same request, even if the fugitive has been discharged in the meantime', so that it is open to argument whether, equally, several orders under s 12(3) of our Act can lawfully be made on foot of the same requisition even if the applicant is spared committal proceedings by success in his present application for judicial review. But actually it is difficult to see the minister, on the same requisition based on the same requisition papers, issuing another order under s 12(3) if it is ultimately held on judicial review, after all stages of appeal, that the applicant is not a fugitive criminal for the reason that he is not 'a person who is charged'. As against that, if, in the absence of judicial review, the applicant undergoes committal proceedings and is discharged on the ground that there is no prima facie proof that he is 'a person who is accused' and he succeeds on any review at the instance of

the Public Prosecutor under s 37 and in all the ensuing appeals, it is also difficult to see the minister issuing another order under s 12(3) on the same requisition based on the same requisition papers. I think the advantage in the form suggested of going for judicial review is conjectural and indefinite. A

The other reason stated by Dato' Shafee why it is necessary for the applicant to seek judicial review is that one of the ancillary orders that he seeks is an order of prohibition to prevent any further action being taken by the minister, the magistrate and the sessions court judge pursuant to the existing request by the Union of India and any future requests premised on the same facts. Dato' Das argued that it would be unusual for the court to make an order to tie the hands of the executive *in futuro*. The Union of India's solicitors have since the close of submissions brought to my attention *Regina v Magistrates Campbell and Pool, ex p MacLeod* 58 DLR (2d) 94 and s 54(d) of the Specific Relief Act 1950, which prohibits the granting of an injunction 'to interfere with the public duties of any department of any Government in Malaysia'. Maybe what the Privy Council observed in *Bowe* about the lawfulness of making several s 7 orders on foot of the same requisition may have to be considered in determining whether an order of prohibition such as is sought may be made. I am not sure whether it can or should be made. I am not confident that it can be made. Whatever the position may be, I do not think the fact that an order of prohibition is sought should save an application for judicial review from the objection of prematurity, for, otherwise, to defeat such an objection one needs only to put in a prayer for an order of prohibition. The same may be said about the first reason. If the reason is accepted that judicial review has the advantage that the order initiating the extradition process may be quashed, then in every application for judicial review to quash such an order any objection as to prematurity cannot succeed. B C D E F

There is only one other point of submission by Dato' Shafee that I have to mention. He said that in this case there is also abuse of process for which the applicant is entitled to seek judicial review. I do not see that this application is brought on the ground of abuse of process. Maybe what Dato' Shafee meant was that since the minister had no jurisdiction to give the special direction and make the order of 15 December 2000 because the applicant was not 'a person who is accused' and was therefore not a fugitive criminal, the doing of those acts was an abuse of process. I do not think that abuse of process can be piled on in that manner, as though every act done without jurisdiction necessarily amounts to abuse of process. G H

In the light of the cases that I have considered, and in view of the fact that s 19 of the Act provides adequate avenue for challenges to the extradition process, I am of opinion that, judicial review being a discretionary remedy, a pre-committal application for judicial review of the extradition process is premature and ought not to be entertained unless there is for good reason for seeking judicial review or it is clear that the committal proceedings must fail for reasons such as that the act challenged is done by the wrong person or the offence specified is not an extradition I

A crime. No good reason has been shown by the applicant and neither do I find that this is a clear case that the committal proceedings must fail in the sense intended by the Privy Council in *Bowe*.

I therefore dismiss this application with costs.

Applicant's application dismissed.

B

Reported by Lim Lee Na

C

D

E

F

G

H

I